

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





B  
pns

# 75-1115

To be argued by  
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

STEPHEN CARROLL,

Appellant.

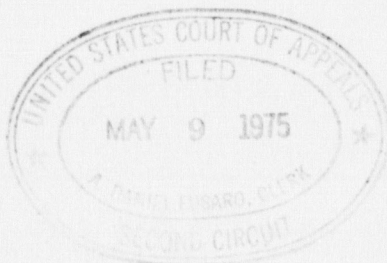
Docket No. 75-1115

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## APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
FEDERAL DEFENDER SERVICES UNIT  
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Foley Square  
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PHYLIS SKLOOT BAMBERGER,  
Of Counsel

PAGINATION AS IN ORIGINAL COPY



JUDGE WARD

74 CRIM. 549

[illegible]

(07)	ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	DISBURSED
	Fine,					
	Clerk,					
	Marshal, (1111)					
	Attorney,					
	<del>Commissioner</del> 21 & 18					
	<del>Witnesses</del> 812,841(a)(1),(b); 111					
	Possess. & distr. w/intent to					
	distr. LSD, I. (Ct.1)					
	Resisting arrest. (Ct.2)					
	(Two Count)					

DATE	PROCEEDINGS
5-28-74	Filed indictment.
6-10-74	No appearance by deft.O'Brien. B/W ordered. Court directs plea of not guilty. Case adjourned to 6-17-74. Bauman,J.
6-17-74	Adjourned to 6-24-74. Knapp,J.
6-24-74	Deft.Carroll(atty. present) Pleads not guilty. Motions returnable in days. Deft. released on his own recognizance. Case assigned to Ward,J for all purposes. Knapp,J.
	-Over-

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
7-12-74	STEPHEN CARROLL-Filed deft's. affidavit and notice of motion for a judicial determination of the mental competence of the deft. pursuant to 18 U.S.C. Sec. 4244, ret. 7-30-74.		
7-17-74	GEORGE O'BRIEN and STEPHEN CARROLL-Filed Govt's. notice of readiness for trial on or after 7-17-74.		
7-31-74	STEPHEN CARROLL-Filed MEMO ENDORSED on deft's. motion dated 7-12-74. Motion granted. No opposition. Settle order on notice.Ward,J.		
9-27-74	STEPHEN CARROLL-Filed ORDER that the deft. be examined by Dr. Norman Weiss for a determination as to his mental competence. A written report is to be submitted to the Court with a copy to Joseph J. Zedrosser, Fed.Def.Serv.Unit, Legal Aid Society. The U.S. Attorney is to pay the said psychiatrist a reasonable fee for his services.....Ward,J. (mailed notice)		
1-22-75	STEPHEN CARROLL-Filed Govt's. affidavit for a writ of habeas corpus ad testificandum for Richard Simons, directed to Warden, Federal Correctional Facility, Danbury, Conn., Writ Issued, ret. 2-27-75.		
1-30-75	Deft. Carroll - Trial begun.		
1-31-75	Trial continued & concluded. Verdict - guilty as charged. Pre-sentence investigation ordered. Sentence date 3-19-75 at 2:15 P.M. R.O.R.....Ward,J.		
2-3-75	STEPHEN CARROLL-Filed Govt's. requests to charge.		
2-10-75	GEORGE O'BRIEN- <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>CLERK'S OFFICE          11/10/75          CO-115          In all cases, the          is still pending.</p> </div>		
2-11-75	STEPHEN CARROLL-Filed CJA Form 20 Copy 2 approving payment to Robert Mitchell, dated 2-5-75.....Ward,J.		
(Continued)			





USA-33s-529 - IND/INF - DISTRIB.-POSSESS CONTROLLED SUBSTANCE  
Rev. 5-27-72

DHM,II:art  
74-0234

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

74 CRIM. 549

UNITED STATES OF AMERICA

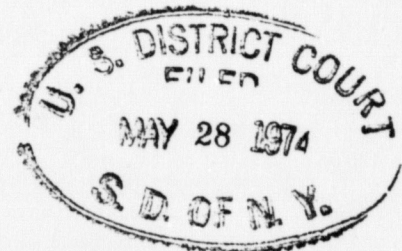
-v-

GEORGE O'BRIEN and  
STEPHEN CARROLL,

Defendants.

INDICTMENT

74 Cr.



The Grand Jury charges:

On or about the 26th day of October, 1973,  
in the Southern District of New York,

GEORGE O'BRIEN and STEPHEN CARROLL,

the defendants, unlawfully, intentionally and knowingly  
did distribute and possess with intent to distribute a  
Schedule I controlled substance, to wit, approximately  
533 tablets of Lysergic Acid Diethylamide (LSD).

MICROFILM  
MAY 29 1974

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(B).)



SECOND COUNT

The Grand Jury further charges:

On or about the 22nd day of January, 1974, in the Southern District of New York, GEORGE O'BRIEN, the defendant, unlawfully, wilfully and knowingly did forcibly resist, oppose, impede, intimidate and interfere with a Special Agent of the Drug Enforcement Administration, formerly the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, said Special Agent being a person designated in Title 18, United States Code, Section 1114, while said Special Agent was engaged in the performance of his official duties.

(Title 18, United States Code, Section 111).

Robert J. Hudson  
Foreman

Paul J. Curran  
PAUL J. CURRAN  
United States Attorney

JUDGE WARD

JUN 10 1974

aty 6-17-74 D/s advised  
as to Dept J'Brien. and Court  
directs a n/g plea be entered  
as to Dept J'Brien

W Birmann J

JUN 17 1974

aty 6-24-74

R

Knapp J

JUN 24 1974 Dept Carroll appears (aty  
John Curley, Legal Aid Present)  
Dept pleads n/g. 10 days for motions  
Case assigned to Ward J. Dept ROR  
W Knapp J

JAN 30 1975

JAN 31 1975

Dept - Carroll - Trial begun  
~~Trial begins~~ Continued + concluded.  
a Verdict - guilty as charged.  
P.S.D. ordered sentence date  
3/19/75 at 2:15 PM. R.O.R.  
Ward J.



R 19 1975

d

Def. 20/a/p to be sentenced as a Y.A.O.  
for observation & study pursuant to T18  
RSC Sec. 5010(e) the results of such study  
to be reported to the Court by the Federal  
Youth Correction Div. of the Board of  
Parole within 60 days or such addl.  
period as the Court may grant at which  
time the deft shall be ret. to the Court  
for imposition of such sentence as the  
Court may then find to be appropriate  
REMANDED

Ward. J.

S

CHARGE OF THE COURT



1 EOPA  
2 THE COURT: "Mr. Carroll testified. A  
3 defendant who wishes to testify is a competent witness and  
4 his testimony should not be disbelieved merely because he is  
5 a defendant. However, in weighing his testimony you  
6 should consider the fact that the defendant has a vital interest  
7 in the outcome of this trial."

8 MR. THAU: All right, I have no objection to  
9 that.

10 THE COURT: Anything else?

11 MR. THAU: That is all for me, your Honor.

12 THE COURT: Very well.

13 MR. EPSTEIN: That is satisfactory.

14 (In open court, jury present.)

15 THE COURT: Good afternoon, ladies and  
16 gentlemen.

17 THE CLERK: The Court is about to charge the  
18 jury. Any spectators wishing to leave the courtroom will  
19 do so now or will remain seated until the completion of the  
20 Court's charge.

21 The marshal will please lock the door.

22 Thank you.

23 THE COURT: Ladies and gentlemen, it is the  
24 custom in this Court for the juror seated in seat number one  
25 to serve as the foreman or forelady of the jury. The foreman

or forelady takes the vote of the jurors and will, if this jury comes to a verdict, report the jury's verdict when the jury returns to the courtroom.

In this case your forelady will be Mrs. Dorothy Harrison.

Madam forelady, ladies and gentlemen:

Welcome now to that stage of the case where you and I do our part in the administration of justice in this case.

You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. ~~you resolve~~ such conflicts as there may be in the evidence. And you draw such reasonable inferences as may be warranted by the testimony elicited on direct and cross examination and the exhibits in the case.

My function is to instruct you on the law applicable to the case. As I said earlier and I repeat again, it is your duty to accept the law as I state it to you in these instructions and to apply it to the facts as you find them. With respect to any fact matter, it is your recollection and yours alone that governs.

Anything that counsel, either for the government or the defendant, may have said with respect to matters in



1 evidence or as to any factual matter, whether stated in  
2 question, in argument or in summation, is not to be substit-  
3 uted for your own independent recollection.  
4

5 As I said, the answer of the witness or answer  
6 of the witnesses, that is what's evidence. The questions  
7 are merely a format for the answers being given and it is  
8 the answers of the witnesses which you will consider.

9 So, too, anything I may have said during the  
10 trial or may refer to during the course of these  
11 instructions as to any matter in evidence or as to any  
12 factual matter is not to be taken in lieu of your own  
13 recollection.

14 From time to time conferences have been  
15 conducted at the side bar. These were sometimes at the  
16 request of the attorneys and sometimes at my request. These  
17 conferences were solely on questions of law or logistics  
18 and are of no concern to you. You are not to draw any  
19 inference for or against either side because of requests  
20 for such conferences.

21 Should you require assistance with regard  
22 to testimony or the law, as I gave it to you in this  
23 charge, you may request by a note sent out of the jury  
24 room, you may request that any portion of the testimony  
25 or any portion of my charge be read back to you.

1 EOpa 278  
2 Upon my receiving your note, I will read it  
3 to counsel and will attempt to comply with your requests  
4 wherever appropriate and proper.

5 In the event you should ask, for example,  
6 for testimony or a portion of my charge to be read back  
7 to you, you will be brought into the courtroom and the  
8 portion of the testimony or the portion of the charge  
9 which you request will be read to you.

10 In the same vein, should you wish to see the  
11 indictment or any exhibit, which is in evidence, you may  
12 call for the indictment or exhibit and it will be sent  
13 into the jury room for you to see.

14 The defendant has pleaded not guilty. There-  
15 fore, under our system of law the government has the burden  
16 of proving the charges against him beyond a reasonable  
17 doubt . The government has the burden of establishing each  
18 and every element of the crime charged beyond a reasonable  
19 doubt.

20 It is a burden that never shifts and remains  
21 upon the government throughout the entire trial.

22 Under our system of law a defendant does not  
23 have to prove his innocence. On the contrary, he is presumed  
24 to be innocent of the charges contained in the indictment.  
25 The presumption of innocence was in his favor at the start



1 EOpa  
2 of the trial and continues in his favor throughout the  
3 trial. It is removed if and when you are satisfied that  
4 the government has sustained its burden of proving the  
5 guilt of the defendant beyond a reasonable doubt.

6 As I told you when you were being selected, an  
7 indictment is not evidence. It is a technique or method  
8 or procedure by which persons accused by a Grand Jury of  
9 crimes are brought into Court and then their guilt or innocence  
10 is determined by a trial jury such as you are. An indictment  
11 has no evidentiary value. An indictment does not  
12 constitute proof or evidence. It is merely an accusation.

13 The indictment in this case names two defendants  
14 George O'Brien and Stephen Carroll. Only one, Stephen  
15 Carroll, is on trial before you. He is the only person  
16 whose guilt or innocence you must announce in your verdict,  
17 although, as I will explain to you shortly, in considering  
18 his guilt or innocence, you may have to determine the nature  
19 of the participation, if any, of the other named defendant.

20 In the determination of innocence or guilt  
21 you must bear in mind that guilt is personal. Guilt  
22 or innocence of a defendant on trial before you must be  
23 determined separately with respect to him solely on the  
24 evidence presented against him or the lack of evidence. The  
25 case of each defendant stands or falls upon the proof or lack

of proof of the charges against him and not against somebody else.

The charges in the indictment in this case relate to a violation of the federal narcotics laws, Sections 812 and 841 of Title 21 of the United States Code.

Title 21, United States Code, Section 841 provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Section 812 sets forth controlled substances in various schedules. Schedule 1 of Section 812 lists: "Lysergic acid diethylamide," which we will sometimes refer to here as LSD, as a controlled substance.

Before you can find Mr. Carroll guilty of the crime charged in this indictment, you must be convinced that the government has proved the following elements beyond a reasonable doubt.

First, that on or about October 26, 1973, the defendant in the Southern District of New York, which includes Manhattan, I mentioned to you that the Central Park Area is within the Southern District of New York, did distribute or possess with intent to distribute a controlled substance.



Second, that he did so unlawfully, intentionally and knowingly. Third, that the substance in Government's Exhibit 2-A, those are the 500 or so pills, that substance is in fact a controlled substance.

We are going to talk now about the three elements of the crime which the government must prove.

The first element, which has to do with the matter of distribution and possession with intent to distribute, the first element which you must find beyond a reasonable doubt in order to convict the defendant is that he distributed or possessed with the intent to distribute a controlled substance.

In a few moments I will instruct you on the phrase "controlled substance."

Now I would like to focus on the meaning of the terms "distribute" and "possess with intent to distribute" as used in the statute which we have in this case.

What do these terms mean? According to the statute the term "distribute" means the actual or attempted transfer of a controlled substance.

The word "possess" means to have actual physical custody of something or to have it in your control.

To have something in your control does not require that you

have it in your hand or pocket.

The word "intent" refers to a person's state of mind. So the term "possess with intent to distribute" can fairly be stated to mean to control an item with the purpose of transferring that item to another or others.

If you find that Mr. Carroll in fact possessed Government's Exhibit 2-A, then you should proceed to examine the other evidence and all the surrounding circumstances to determine whether he had the requisite intent to transfer it to others.

Possession may be of two types, actual or constructive. Actual possession means that a defendant knowingly has personal, manual or physical control of the drug.

Constructive possession means that although the drugs are in the physical possession of another person, in this case the government alleges that the drugs were in the physical possession of George O'Brien, that the defendant knowingly had the power to exercise control over them or over their distribution or to direct their movement or to cause their delivery.

In other words, to possess something you need not have it in your hand or in your pocket. If it is within



your power to exercise control over the substance, you have possession of the substance.

The word "knowingly", which is a portion of the second element of the crime, which is that the defendant must be found to have acted intentionally and knowingly, the word "knowingly" as defined in the crime charged here, means that the particular act was done voluntarily and purposely and not because of mistake or accident.

Knowledge may be proved by a defendant's conduct and by all the facts and circumstances surrounding the case.

Needless to say no person can intentionally avoid knowledge by closing his eyes to facts which would prompt him to investigate.

Knowledge is a matter of inference from facts proved. It is not necessary that the particular defendant you are considering, in this case you are considering Mr. Carroll, be informed as to the details of the transaction in every particular. He must know what is going on. He must be aware of what is happening.

The term "unlawfully, intentionally and knowingly" means that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily as opposed

to mistakengly or accidentally or as a result of some coercion.

Of course, it is not necessary that the defendant knew he was violating a particular law. Rather, it is sufficient, if you are convinced beyond a reasonable doubt, that he was aware of the general unlawful nature of his act.

I have now covered the first element which is that the defendant did distribute or possess with intent to distribute and the second element, "Intentional, knowing activity." You have to determine whether these elements have been proved by the government beyond a reasonable doubt.

I will now turn to the third element. As to the third element, the indictment charges that the controlled substance is lysergic acid diethylamide. I instruct you as a matter of law that lysergic acid diethylamide is a controlled substance. However, you must still find beyond a reasonable doubt that the substance in Government's Exhibit 2-A is lysergic acid diethylamide.

In this regard you may consider the stipulated testimony of Jeffrey M. Weber, a forensic chemist employed by the Drug Enforcement Administration. The stipulation to which I refer is in evidence as Exhibit 6.



1           The government also relies in this case on  
2  
3       what we call aiding and abetting. You may find Mr. Carroll  
4       guilty of the offense charged here if you find beyond a  
5       reasonable doubt that someone else committed the offense and  
6       that Mr. Carroll aided and abetted that person.

7           To determine whether a defendant aided and  
8       abetted the commission of an offense, you ask yourselves  
9       these questions:

10           Did he associate himself with the venture?

11           Did he participate in this as something he  
12       wished to bring about?

13           Did he seek by his actions to make it succeed?

14           If he did, then he is an aider and abettor, but  
15       I caution you that mere presence at or near the scene of the  
16       crime, even when the presence is coupled with guilty knowledge  
17       is not enough to convict the defendant as an aider and  
18       abettor. He can only be convicted if you are convinced  
19       beyond a reasonable doubt that he was a participant in the  
20       distribution of lysergic acid diethylamide and not merely  
21       a spectator.

22           You must consider every act done by him.  
23       Every word said by him during the period to which your  
24       attention has been called by the witnesses in this case and  
25       any reasonable inference which you can draw from the conduct

2 of the defendant as it has been described by the witnesses  
3 in this case.

4 Turning now to your primary function which  
5 is to determine the facts and the truth, how do you determine  
6 the truth? How do you determine the credibility of the  
7 witnesses who appeared here and testified in this courtroom?

8 Well, as I tell juries quite regularly, you  
9 use your own plain everyday common sense. You brought your  
10 common sense with you the first day you stepped into the jury  
11 box.

12 You have it with you now. You will take it  
13 with you into the jury room when you retire to deliberate  
14 and I trust that when you return ultimately from the jury  
15 room you will still have it with you.

16 You have seen the witnesses, you have observed  
17 the manner of their testifying and whatever credit you may  
18 give them must be determined by their conduct and their  
19 manner of testifying and their relationship or interest in  
20 the outcome.

21 In other words, you again apply your  
22 common sense and your everyday experience.

23 You may, of course, take into consideration  
24 the interest of a witness. For example, the narcotics  
25 agents might be said to have an interest in this case. It is



1 a case which they investigated. An interested witness is  
2 not necessarily unworthy of belief. That is just one factor,  
3 however, which you should consider in determining the weight  
4 and credibility to be given that witness' testimony.  
5

6 If any witness has wilfully testified falsely  
7 as to any material fact, you may disregard all of his test-  
8 imony or accept such part of it as you believe worthy of  
9 belief or as it appeals to your reason or judgment.

10 A witness may be discredited or impeached by  
11 contradictory evidence or by evidence that at other times  
12 he has made statements which are inconsistent with his present  
13 testimony.

14 If you believe that any witness has been  
15 impeached and thus discredited, it is your exclusive province  
16 to give the testimony of that witness such weight and  
17 credibility, if any, as you may think it deserves.

18 Mr. Carroll testified. A defendant who wishes  
19 to testify is a competent witness and his testimony should  
20 not be disbelieved merely because he is a defendant.

21 However, in weighing his testimony you should  
22 consider the fact that the defendant has a vital interest  
23 in the outcome of this trial.

24 Evidence has been introduced that the  
25 defendant confessed on I believe two occasions that he

1 committed the crime charged in the indictment. The jury  
2 should carefully scrutinize all the circumstances  
3 surrounding the confession and determine whether it was made  
4 freely and voluntarily.  
5

6 If you find that the confession was made by  
7 the defendant freely and voluntarily with an understanding  
8 of the nature of his confession and without fear or coercion,  
9 either physical or psychological, or without promise of  
10 reward, you should consider the confession together with  
11 all the other evidence in determining the guilt or innocence  
12 of the defendant.

13 However, if you find that the confession was  
14 not made freely and voluntarily, you should disregard it  
15 entirely.

16 You may hear me sometimes refer to direct  
17 evidence and to circumstantial evidence. It is well to  
18 explain now the difference between the two types of  
19 evidence.

20 Direct evidence is where a witness testifies  
21 as to what he saw, heard or observed, what he knows  
22 of his own knowledge, something which comes to him by virtue  
23 of his own senses.

24 Circumstantial evidence is evidence of facts  
25 and circumstances from which one may infer connected facts



which reasonably follow in the common experience of mankind.

Stated somewhat differently: Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

Let us take one simple example, one which is often used in this courthouse, to indicate what is meant by circumstantial evidence.

We will assume, although it may be contrary to fact as I look out the window, ~~we will assume that when~~ you entered the courthouse this morning the sun was shining brightly outside and it was a clear day, there was no rain, the sky was clear.

Assume that in this courtroom the blinds are drawn and drapes are on the windows and they are closed so that you cannot look outside.

Assume that you are sitting in your jury box and despite the fact that it was sunny, clear and dry when you entered the building earlier in the day someone walks

through the door with an umbrella dripping water followed in a short time by another person wearing a raincoat and you observe that the raincoat is wet.

Taking our assumptions you cannot look out of the courtroom to see directly whether it is raining or not and if you are asked is it raining, you cannot say you know it directly of your own observation, but certainly upon the combination of facts as I have given them, even though when you entered the building it was not raining outside, it would be reasonable and logical for you to conclude that it is raining now.

That is about all there is to circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence of some further fact.

There are times when different inferences may be drawn from facts whether they are proved by direct or circumstantial evidence. The government asks you to draw one set of inferences while the defendant asks you to draw another. It is for you to decide and for you alone what the inferences are you will draw.

Knowledge and intent, which I mentioned before and which I tried to define for you a few minutes ago, exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have



1       EOpa  
2       for arriving at a decision is these inferences. It is  
3       for you to take into consideration all the facts and  
4       circumstances shown by the evidence including the exhibits  
5       and to determine from all such facts and circumstances  
6       whether the requisite knowledge and intent was present at  
7       the time in question.

8                 Direct proof is unnecessary. Knowledge and  
9       intent may be inferred from all the surrounding  
10      circumstances.

11                Now, you have heard a lot of statements by  
12      both counsel about a missing witness. I instruct you in that  
13      regard as follows:

14                If it is peculiarly within the power of either  
15      the prosecution or the defense to call a witness who could  
16      give material testimony on an issue in this case, failure  
17      to call that witness creates the presumption that his  
18      testimony would be unfavorable to such party.

19                However, no such presumption should be drawn  
20      by you where the witness is equally available to both  
21      parties.

22                The defendant contends that the transactions  
23      in this case were induced by law enforcement officials and  
24      their agents. In the latter regard I refer specifically to  
25      Mr. Simmons.

1 EOpa  
2 In short, the defendant advances a defense which  
3 the law terms entrapment. Under this defense if you find  
4 that no crime would have occurred but for the conduct of  
5 the law enforcement officials or Mr. Simmons, you must acquit  
6 Mr. Carroll of all charges.

7 Now, let us consider this defense. Law  
8 enforcement officials in their efforts to enforce the  
9 criminal laws and to apprehend those engaged in criminal  
10 activities may resort to stratagems or deception and may also  
11 use informers. Such methods are not in any way forbidden  
12 by law and are often necessary in the detection and  
13 prosecution of certain crimes.

14 Whether or not you or I personally agree  
15 with the policy of using such methods is not in issue and is  
16 not before you. The fact that government officials or  
17 their agents merely afford opportunities or facilities to  
18 one who is ready and willing to violate the law when the  
19 opportunity presents itself does not constitute entrapment.

20 When, for example, the government has reasonable  
21 grounds for believing that a person is engaged in the  
22 illicit sale of narcotics, it is not unlawful entrapment  
23 for a government agent to pretend to be someone else and to  
24 offer, directly or through an informer or other decoy, to  
25 purchase narcotics from such suspected person.



1  
2 However, in their efforts to enforce the  
3 laws government officials or employees may not -- or their  
4 agents -- may not entrap an innocent person who, except for  
5 the government's inducement, would not engage in the criminal  
6 conduct charged.

7 Thus, if the criminal design originates with  
8 government officers or their agents and they implant in the  
9 mind of an otherwise innocent person the disposition to  
10 commit the crime charged and to induce its commission, the  
11 prosecution may not succeed.

12 In short, entrapment occurs only when the  
13 criminal conduct was the product of the creative activity  
14 of law enforcement officials or their agents, that is, if  
15 they initiate, incite, induce, persuade or lure an otherwise  
16 innocent person to commit a crime or to engage in criminal  
17 conduct and if that occurs the government may not avail  
18 itself of the fruits of those investigating activities.

19 Such conduct offends the public conscience  
20 and, so, while the crime may have been committed, the govern-  
21 ment is barred from benefiting by the improper conduct of  
22 its own officers or employees.

23 Here the defendant contends he was free of  
24 any criminal purpose to deal in drugs and that he had no  
25 previous disposition, intent or purpose to engage in such

1 criminal activity, but was induced, persuaded to engage in  
2 t he activity charged against him by the creative activity  
3 of government employees and their agents.  
4

5 The government denies this and contends that  
6 the defendant was merely afforded the opportunity to  
7 commit the offense and that he readily and willingly responded  
8 thereto and engaged in the transactions which are the  
9 subject of the indictment without inducement of any kind.

10 In this case Mr. Simmons acted as an agent for  
11 the government. If you find some evidence that a government  
12 agent by initiating the illegal conduct induced the  
13 defendant to engage in such conduct, then the government  
14 must prove beyond a reasonable doubt that the inducement  
15 was not the cause of the crime, that is, that the defendant  
16 was ready and willing to commit the crime without any  
17 persuasion.

18 To sustain its burden of proof the government  
19 has to satisfy you that in fact its agents have not seduced  
20 an innocent person, but that the inducement which brought  
21 about the offense charged here was but another instance  
22 of the kind of conduct which the defendant was prepared  
23 to engage in if given an opportunity.

24 You have heard me mention "reasonable doubt"  
25 on several occasions. I suggest the time has come for me  
to explain to you what is meant by reasonable doubt.



A reasonable doubt is such a doubt as would cause prudent men to hesitate to act in matters of importance to themselves. Let me repeat that. A reasonable doubt is such a doubt as would cause prudent men to hesitate to act in matters of importance to themselves.

It is doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience.

Reasonable doubt is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty.

It is not sympathy for a defendant.

Vague, speculative or imaginary qualms or misgivings are not reasonable doubts.

It is not necessary for the government to prove the guilt of the defendant to a mathematical certainty or beyond all possible doubt. If that were the rule, few men or women, however guilty they might be, would be convicted. The reason is that in this world of ours it is practically impossible for a person to be absolutely certain of any controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law is such that in a

1 criminal case it is enough that a defendant's guilt is  
2 established beyond a reasonable doubt. Not beyond all  
3 doubt.  
4

5 If after a fair, impartial and careful  
6 consideration of all the evidence you are convinced of the  
7 guilt of the defendant, you must convict.

8 If, on the other hand, after such a fair,  
9 impartial and careful consideration of all the evidence you  
10 doubt the defendant's guilt, you must acquit him.

11 You are to decide the case upon the  
12 evidence and the evidence alone. You must not be influenced  
13 by any assumptions, conjecture or sympathy or any inference  
14 not warranted by the facts until proven to your satisfaction.

15 I will conclude with these few final remarks:

16 Under your oath as jurors you may not allow  
17 the consideration of punishment, which might be inflicted  
18 upon a convicted defendant, to influence your verdict in  
19 any way or in any sense enter into your deliberations.  
20 The duty of imposing sentence rests exclusively upon the  
21 Court.

22 Your function is solely to determine the  
23 guilt or innocence of the defendant upon the basis of the  
24 evidence and the law.

25 If you believe that the charges against the



defendant have not been proved beyond a reasonable doubt,  
the defendant should be acquitted.

But, on the other hand, if you find that the  
charges have been proved beyond a reasonable doubt, you  
should not refuse because of sympathy or for any other  
reason to render a verdict of guilty.

There are 12 people on this jury. Any verdict  
must be the unanimous verdict of all of you.

However, no one should enter upon the  
deliberations in the jury room with such pride of opinion  
that he or she would refuse to change it if convinced by  
intelligent argument on the part of another juror or jurors  
that they are right.

However, you are not to do violence to your  
own well-founded opinion and common sense.

You will be taking your common sense into  
the jury room. I expect that when you come out of the  
jury room your common sense and your good conscience will  
accompany you.

You are entitled each of you to your opinion.  
In other words, each of you must decide the case for himself  
or herself after thoroughly reviewing the evidence and  
exchanging views with your fellow jurors.

Ladies and gentlemen, I have now completed

1 EOpa  
2 my charge. Before sending you to deliberate, I will see  
3 counsel at the side bar.

4 In the meantime, Mr. David and Miss Vasic  
5 should proceed to the jury room to get their coats and  
6 their other belongings and then to return to the courtroom  
7 because they are serving as alternate jurors and after I  
8 send jurors 1 through 12 into deliberate, I should like to  
9 speak with them.

10 They have had the frustrating experience, as  
11 alternate jurors, of having sat through this case, but  
12 will not be present to deliberate with you so that when  
13 I send them on their way, I want to thank them personally  
14 on behalf of all of us here for the service which they have  
15 rendered to this jury.

16 So Mr. David and Miss Vasic, if you will  
17 just step out of the courtroom, retrieve your belongings  
18 from the jury room and return to the courtroom, I would  
19 appreciate it. I will ask the remaining jurors to remain  
20 in their seats and I will see counsel at the side bar.

21 (At the side bar.)

22 MR. THAU: Your Honor.

23 THE COURT: Are there any exceptions?

24 MR. THAU: Yes, your Honor. The defendant  
25 excepts to so much of your Honor's charge as stated seven



Certificate of Service

May 1, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Hest Boney